

31882

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218561

DATE: August 6, 1985

MATTER OF: Belfort Instrument Company

DIGEST:

Where an amendment is issued to make necessary corrections in ambiguous technical specifications in an invitation for bids, failure to acknowledge receipt of such amendment renders a bid nonresponsive.

Belfort Instrument Company protests the Army's rejection of its bid for 50,000 chemical detector kits under invitation for bids (IFB) No. DAAA09-85-B-0044, issued by the U.S. Army Armament Munitions and Chemical Command. Belfort submitted the low bid on this solicitation, but was rejected as nonresponsive because it failed to acknowledge amendment No. 0002 to the IFB. Belfort contends that the amendment was not material and therefore, that its failure to acknowledge the amendment should be waived as a minor informality.

We deny the protest.

The Army reports that after the IFB was issued, it discovered that Section C, "Drawings/Specifications," was inaccurate. Section C provided that the drawings and specifications applicable to the procurement were those in "Technical Data Package Listing-TDPL 5-77-2001 with revisions in effect as of 84 Feb. 21 (except as follows):" The exceptions which followed consisted of a left-hand column listing, by reference number, a series of engineering drawings, Engineering Change Proposals (ECPs) and Notices of Revision, with corresponding right-hand columns of instructions to either delete, substitute or add those documents or portions of them. These columns were not accurate when the solicitation was printed. The Army issued Amendment 0001 to correct Section C, but the amendment was also faulty. Therefore, Amendment 0002 was issued, instructing bidders to delete portions of Amendment 0001 and providing a revised Section C as their replacement.

Belfort did not receive Amendment 0002, but submitted its bid on the basis of the technical information contained in the basic solicitation and in Amendment 0001. Belfort

032766

has not raised the nonreceipt of Amendment 0002 as a basis for protest.^{1/} The issue, rather, is whether Belfort's failure to acknowledge Amendment 0002 may be waived.

If an amendment is material, failure to acknowledge its receipt renders a bid nonresponsive and ineligible for award. See Emmett R. Woody, 63 Comp. Gen. 182 (1984), 84-1 CPD ¶ 123. A contracting officer may waive a defect in a bid as a minor informality, however, if the defect is immaterial and if waiver will not be prejudicial to other bidders. Leslie & Elliott Co., 64 Comp. Gen. 279 (1985), 85-1 CPD ¶ 212. Under the Federal Acquisition Regulation, a defect is immaterial if the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the solicited supplies or services. 48 C.F.R. § 14.405 (1985).

The Army argues that Amendment 0002 was material because it provided the only unambiguous description of critical technical requirements. The agency contends that before the amendment was added, the solicitation was confusing and lacked necessary technical drawings. In support of this argument, the Army notes that before Amendment 0002 was issued, one bidder expressed confusion as to the government's exact requirements and requested clarification of the specifications, even though the bidder had manufactured the chemical detector kit before.

Belfort insists, however, that the amendment was largely redundant, and that its cost impact was negligible. The protester focuses on one document, ECP C4C2419, which the Army had cited as an example of a material change effected by the amendment. Although this ECP was included in the "exceptions" list in the original solicitation and in Amendment 0001, it appeared in the list without any corresponding instructions concerning whether part or all of the document was to be deleted, substituted or added. In Amendment 0002, the bidder was instructed to add cards numbered 2 and 3 from this ECP.

^{1/} The general rule in this area is that nonreceipt of an IFB amendment is not a viable ground for protest absent a showing of a deliberate agency attempt to preclude the protester from bidding, as long as adequate competition and reasonable prices were obtained. General Atronics Corp., B-217305, Jan. 4, 1985, 85-1 CPD ¶ 20.

In this connection, the Army notes that with the proper instructions, ECP C4C2419 requires the contractor to perform a different, more complete test procedure than was required under the original IFB. The Army alleges that a failure under the new test would be much more expensive to the contractor than a failure under the earlier test; the Army's engineering staff estimates the potential cost impact of this ECP to be at least \$50,000.

Belfort, on the other hand, argues that because the ECP was listed in the original IFB without any corresponding instructions, it was already incorporated in its entirety. The protester notes that the technical data package supplied with the solicitation already included cards 2 and 3 of the ECP, and contends that the instructions in Amendment 0002 to add the cards did not change its legal obligation in any way. Belfort argues, therefore, that the amendment was not material.

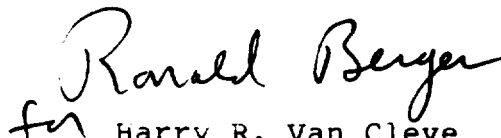
We do not find this argument persuasive. As noted previously, Section C of the original IFB contains a basic technical data package applicable to the procurement, plus a list of exceptions to it. This list contains a series of documents in one column, with a corresponding series of columns explaining what is to be done with the document. Without a specific instruction for any document listed, such as ECP C4C2419, it simply is not clear whether the document is to be added, deleted, or substituted, either in part or in whole.

Moreover, we do not agree with the protester's characterization of this ECP as "the only change that has been placed in contention by the parties." While this is the only portion of the amendment for which the Army has attempted to estimate a potential cost, it is apparent that Amendment 0001 includes many document numbers either with incorrect corresponding instructions or without any corresponding instructions. Amendment 0002, which includes some instruction for each document listed, therefore is necessary to establish the government's actual requirements. Prior to the issuance of Amendment 0002, the Army's requirements were ambiguous, and therefore, a contract based on Belfort's bid would not create a clear legal obligation to meet the government's needs as identified by the amended IFB. See Kentucky Building Maintenance, Inc., B-215397, Dec. 19, 1984, 84-2 CPD ¶ 683. We agree with the Army that by providing these instructions, Amendment 0002

significantly affected the scope of performance required under the IFB, and therefore was material. See Molony & Rubien Construction Co., B-216963, Nov. 13, 1984, 84-2 CPD ¶ 526.

The protester and the Army have both presented arguments on the issue of whether the effect of Amendment 0002 is negligible in terms of price. While these discussions are crucial in cases where the amendment only affects price--e.g., in wage-rate requirement increases--price is not the only dispositive factor in determining if an amendment is material. See Doyon Construction Co., 63 Comp. Gen. 214 (1984), 84-1 CPD ¶ 194. Therefore, in light of our conclusion that Amendment 0002 was material for reasons other than its effect on price, it is not necessary to determine the price impact of the amendment here.

The protest is denied.


for Harry R. Van Cleve
General Counsel